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IN THE

Supreme Court of the United States

October Term, 1957

No. 783

LEONARD D. SPEED, JOSEPH SPAGNA and JOHNNY HERNDON,

Petitioners,

—v.—

THE CITY OF TALLAHASSEE, FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, TALLAHASSEE, FLORIDA

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Petitioners,

—v.—

THE CITY OF TALLAHASSEE, FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, TALLAHASSEE, FLORIDA

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of the Second Judicial Circuit of the State of Florida at Tallahassee, Florida, entered November 18, 1957, in the above entitled cause.

Opinions Below

The opinion of the Municipal Court of the City of Tallahassee, Florida which was rendered when it denied petitioners' motion for a directed verdict appears on page 74 of the certified transcript of the proceedings in the Municipal Court of the City of Tallahassee, Florida, and is printed in Appendix A, *infra*. No other opinion was rendered by that court. No opinion was rendered by the Cir-

cuit Court of the Second Judicial Circuit other than that which is contained in its judgment affirming the judgment of the Municipal Court which appears on page 19 of the certified record in the Circuit Court and which is printed in Appendix B, *infra*. The Circuit Court rendered no opinion upon denying petitioners' motion for review of judgment on appeal other than that contained in its order denying said motion and which appears on page 25 of the record in the Circuit Court and which is printed in Appendix C, *infra*. These opinions are not officially reported.

Jurisdiction

Petitioners seek to have this Court review the judgment of the Circuit Court of the Second Judicial Circuit of the State of Florida which affirmed the judgment of the Municipal Court of the City of Tallahassee, Florida, holding Ordinance No. 741 of the City of Tallahassee, Florida constitutional and adjudging petitioners guilty of a violation of the ordinance. The Circuit Court's judgment was rendered and entered on November 15, 1957. Petitioners' motion for review of Circuit Court's final judgment on appeal was denied on November 18, 1957. The Circuit Court was the highest court of the state in which a decision could be had in this case.[1] Petitioners, having challenged the ordinance as repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in both the Municipal and Circuit courts, invoke the jurisdiction of this Court under Title 28, United States Code, Section 1257(3).

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[1] Florida Constitution (1956) Art. 5, §6; Florida Statutes Annotated 26.53.

Questions Presented

1. Whether Ordinance 741 of the City of Tallahassee, Florida, establishes standards to be achieved by the bus company in the seating of its passengers which are so vague and indefinite as to violate the requirements of the due process clause of the Fourteenth Amendment to the Constitution?

2. Whether the orderly refusal of petitioners to return to seats arbitrarily assigned to them by the bus driver, pursuant to rules and regulations allegedly adopted by the bus company under color of authority conferred by the ordinance in question, can be declared and punished as a crime, without violating rights secured to petitioners by the due process clause of the Fourteenth Amendment to the Constitution?

3. Whether Ordinance 741 of the City of Tallahassee, Florida, which is a criminal ordinance, is so vague, so indefinite, and so uncertain in its terms as to be unconstitutional and void on its face?

4. Whether Ordinance 741 of the City of Tallahassee, Florida, as applied in this case, violates the equal protection clause of the Fourteenth Amendment to the Constitution in that it was applied in such a manner as to segregate the three petitioners from their three companions, solely because of their race and color.

Constitutional Provisions and Ordinances Involved

The ordinance involved in this case is Ordinance 741 of the City of Tallahassee, Florida, which was adopted on January 7, 1957, by the Tallahassee City Commission. It is set forth in Appendix D.

The case also involves the due process and equal protection clauses contained in Section 1 of the Fourteenth Amendment to the Federal Constitution which provide as follows:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioners boarded a bus of the Florida Associates, Inc. in the City of Tallahassee, Florida on January 19, 1957 (T. 14).[2] Petitioners were accompanied by three other persons who boarded with them (T. 15-16). When these six persons boarded the bus, the driver assigned each person to a seat (T. 13-14). Petitioner Spagna and two of the three other persons were assigned seats in front of petitioners Speed and Herndon and the third of the other persons boarding with petitioners (T. 12, 14). The other three persons were Owens, Folson and Kennedy (T. 11, 14, 46). After riding about ten blocks, each petitioner changed his seat, so that each sat with one of the other members of the group (T. 17). The driver ordered the petitioners back to the seats assigned to them (T. 16, 19, 47). Upon their refusal to return to their assigned seats, the driver offered to return their fares, which they refused (T. 19, 47). The driver then ordered them to leave the bus (T. 19, 47). Petitioners refused to leave the bus (T. 19, 47). Because of petitioners' refusal to return to their assigned seats or to leave the bus, the driver summoned the police and caused petitioners to be arrested for violating Or-

[2] The "T" references in parentheses refer to the transcript of the trial in the Municipal Court.

dinance 741 (T. 19). Both the driver and the police testified that there was no disorder or disturbance at any time (T. 32-33, 48).

Ordinance 741, as it recites, was adopted by the City Commission as an amendment to Ordinance 368 following a local challenge in the courts of the validity of Section IV of Ordinance 368 which required racial segregation on the buses (Appendix D).[3] The ordinance further recites that because of the doubtful validity of Section IV of Ordinance 368, in light of recent decisions of this Court, certain acts of violence, destruction of property and threats to the peace resulted from operation of the buses. Just prior to adoption of Ordinance 741 on January 7, 1957, and during the operation of the buses under said Section IV, the drivers operated the buses without assigning passengers to seats (T. 21). By proclamation of the Governor of Florida, dated January 1, 1957, all motor bus transportation in Tallahassee was suspended until further order of the Governor. The ordinance declares that this action was taken by the Governor because of the foregoing facts. All of these conditions, the ordinance states, resulted in an emergency necessitating the adoption of this ordinance which, in essence, makes it a crime for a person riding a public bus in Tallahassee to occupy any seat or standing space other than the seat or standing space assigned to him or her by the driver.

The ordinance purports to empower the bus company to make and enforce reasonable rules and regulations govern-

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[3] In *Cities Transit, Inc.* v. *City of Tallahassee*, 2 Race Relations Law Reporter 137 (1957), the bus company obtained a preliminary injunction against the City enjoining it from interfering with its non-segregated operation of the buses in accordance with recent decisions of this Court. The City had commenced a proceeding in the state court to compel the bus company to enforce segregation as required by Section IV of Ordinance 368. *City of Tallahassee* v. *Cities Transit, Inc.*, 2 Race Relations Law Reporter 135 (1957).

ing the seating and placement of passengers in such a manner as (1) to insure equal distribution of the weight of passengers in order to prevent accidents, (2) to insure maximum health and safety to the end that life and limb not be endangered or threatened by violence or overt acts of violence and (3) to insure peace, tranquility and good order among passengers and society generally.

But the seats assigned to petitioners were assigned to them by the driver on a wholly arbitrary basis as the record does not disclose any rules and regulations which were in fact adopted by the bus company and approved by the City Commission as required by the ordinance. The City did not prove or offer to prove, upon the trial of petitioners, that any rules or regulations had been adopted by the bus company and approved by the City Commission which conformed to the standards of the ordinance. The driver testified that he followed the orders of the company and the standards of the ordinance, yet petitioners' questioning brought out that the driver did not weigh the petitioners and had no reason to believe that where he assigned petitioners had any effect whatsoever on the weight distribution in the bus, or upon the health and safety of petitioners or other passengers, or upon the peace, tranquility and good order of the passengers or society in general (T. 30, 31-33). Petitioners also brought out on cross examination of the driver that there was no disturbance on the bus when petitioners entered or at any time thereafter (T. 32-33). Although the driver denied that he took race into consideration in the assignment of passengers and that he demanded that petitioner Spagna return to his assigned seat because Spagna sat next to a colored person when he changed his seat (T. 37), it is clear from the record in this case and the recitals of the ordinance that the only justification for requiring assignment of seats and standing space, and making otherwise lawful conduct unlawful,

is to afford a subterfuge for continuing the policy of racial segregation (T. 43).

How Federal Questions Were Raised and Disposed of

Petitioners were tried and convicted on February 27, 1957 in the Municipal Court of Tallahassee of a violation of Ordinance 741 (T. 75). At the close of the City's case, petitioners moved for a directed verdict on the ground that the ordinance violates the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution (T. 62-69). The Municipal Court, in denying this motion, ruled that the ordinance is clothed with a presumption of constitutionality and that petitioners had brought forth nothing to demonstrate its unconstitutionality (T. 74). Petitioners were fined $500 and sentenced to 60 days in jail (R. 10, 11, 12).[4]

From the judgment of conviction, petitioners appealed to the Circuit Court of the Second Judicial Circuit of the State of Florida. In their grounds for appeal petitioners assigned the trial court's refusal to grant their motion for directed verdict as one of the grounds upon which they based their appeal (R. 7). Upon the appeal, the Circuit Court ruled that no denial of any constitutional or statutory right of petitioners was shown (R. 19). On November 18, 1957, the Circuit Court denied petitioners' motion for review of judgment on appeal (R. 25).

[4] The "R" references in parentheses refer to the record in the Circuit Court.

REASONS FOR ALLOWANCE OF WRIT

I.

The Florida courts have decided a Federal question of substance which is not in accord with applicable decisions of this Court.

A. The ordinance in question here establishes standards to be achieved by the bus company through the adoption of rules and regulations which are patently vague and indefinite, thus permitting of arbitrary action by the bus company. The bus company is required to adopt rules and regulations which will maintain peace, tranquility and good order not only among its passengers but "of society generally." As this Court recently held in *Staub* v. *City of Baxley*, —— U. S. ——, No. 48 (decided January 13, 1958), such "criteria are without semblance of definitive standard or other controlling guides," as required by the due process clause of the Fourteenth Amendment. In the context of this case, such a standard is so vague and indefinite as to permit the bus company to assign Negro and white passengers to separate seats if, in the judgment of the bus company, this will maintain the peace, tranquility and good of Tallahassee society generally, which, as the ordinance discloses, is a society which has had disturbances of the peace growing out of desegregation of the buses.[3] And, as the record in this case shows, the driver did order petitioner Spagna to return to his assigned seat after he had changed his seat and sat next to a colored person. The driver could not ascribe any other valid reason for order-

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[3] *City of Tallahassee* v. *Cities Transit, Inc.*, 2 Race Relations Law Report 135 (1957). Although it is not made clear by the ordinance or the record in this case, some disturbances of the peace apparently occurred during the time that the bus company operated the buses on a non-segregated basis just prior to adoption of Ordinance 741.

ing Spagna to return to his seat. Despite this constitutional infirmity, which appears on the face of the ordinance, the Florida courts have sustained the validity of the ordinance over petitioners' objections that the standards are repugnant to due process requirements.

B. The Florida courts have also decided that in this case—where it clearly appears that the bus driver assigned seats to petitioners on a wholly arbitrary basis and that petitioners were charged and convicted of violating an ordinance which makes it a crime to occupy any space on a bus other than the space assigned by the driver—no violation of the constitutional rights of petitioners appears. This determination is contrary to the long line of applicable decisions of this Court holding arbitrary state action which interferes with liberty of the individual violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States, e.g., *Staub* v. *City of Baxley*, —— U. S. ——, No. 48, decided January 13, 1958; *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Buchanan* v. *Warley*, 245 U. S. 60 (1917). In short, as this Court recently said in the case of *Slochower* v. *Board of Education of N. Y.*, 350 U. S. 551 (1956), "There has not been the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process."

C. Florida has also decided this case contrary to applicable decision of this Court by sustaining the validity of an ordinance which is so vague as to make criminal an innocent act. The ordinance in question does not specify what changes from the seat assigned by the driver constitute a crime. Ordinance 741 creates an entirely new offense. It makes conduct which has always been perfectly

lawful suddenly unlawful. It makes innocent conduct a crime. As the driver testified on the trial, a man could not select a seat next to his wife if he boarded the bus after his wife had boarded and was seated, without the express permission of the driver (T. 28). Yet the ordinance does not notify a man that he is guilty of a crime if he sits or stands next to his wife without being assigned to such space by the driver. Consequently, a person of ordinary intelligence would not know what conduct on the bus would subject him to criminal sanctions, and reasonable men could easily differ as to what conduct is included in the offense. Because of this uncertainty and indefiniteness, as this Court has repeatedly held, the ordinance in question here is void on its face for vagueness. *United States* v. *Cardiff*, 344 U. S. 174 (1952); *Winters* v. *New York*, 333 U. S. 507 (1948); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Chaplin Refining Co.* v. *Corporation Commission*, 286 U. S. 210 (1932); *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500 (1926); *United States* v. *Cohen Grocery*, 255 U. S. 81 (1921). In *Winters* v. *New York*, *supra*, this Court quoted language from a state case which is applicable to this case:

> "Where the statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty."

D. Finally, Florida courts have decided this case contrary to applicable decisions of this Court construing the equal protection clause of the Fourteenth Amendment to the Federal Constitution. It is clear from the recitals contained in the ordinance which constituted the basis of its enactment, from the facts of this record, and other related

cases,[6] that the ordinance is an attempt to facilitate perpetuation of the policy of segregating the races on the buses under the perennial guise of preserving the peace. *Browder* v. *Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd 352 U. S. 903 (1956). Tallahassee cannot accomplish indirectly by this ordinance that which it is prohibited from doing directly by the dictates of the requirement of equal protection; for even if the ordinance in question can be said to be fair on its face, the record discloses that here it was in fact used to separate Negro and white passengers solely because of their race, no other reason for the separation appearing. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886).

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[6] *Cities Transit, Inc.* v. *City of Tallahassee*, 2 Race Relations Law Reporter 137 (1957); *City of Tallahassee* v. *Cities Transit, Inc.*, 2 Race Relations Law Reporter 135 (1957).

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court issue a writ of certiorari to the Circuit Court of the Second Judicial Circuit of Florida to review its final judgment in this case.

Respectfully submitted,

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APPENDIX A

Ruling of Municipal Court of Tallahassee, Florida, Upon Petitioners' Motion for Directed Verdict as It Appears on Page 74 of the Transcript of Proceedings in the Municipal Court

The Court: An ordinance or a law comes into court with a presumption of legality and constitutionality and nothing has been presented by way of testimony thus far to change that presumption in favor of the constitutionality and legality of this ordinance, therefore, the Court is denying the motion submitted by the Defense.

APPENDIX B

IN THE

CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF FLORIDA

IN AND FOR LEON COUNTY

At Law #8581

LEONARD D. SPEED, JOSEPH SPAGNA and JOHNNY HERNDON,

Appellants,

—VS.—

CITY OF TALLAHASSEE, FLORIDA,

Appellee.

FRANCISCO A. RODRIGUEZ, Tampa, *for Appellants.*

LEO L. FOSTER and EDWARD J. HILL, Tallahassee, *for Appellee.*

JUDGMENT ON APPEAL FROM THE MUNICIPAL COURT OF THE CITY OF TALLAHASSEE, FLORIDA

This cause coming on to be finally heard upon the appeal entered herein on the 4th day of March, A. D. 1957 from a judgment and sentence pronounced against appellants in the Municipal Court of the City of Tallahassee, Florida, and counsel for the r pective parties having filed briefs and orally argued t d cause before this court, and the record in said caus ving been examined and no denial of any constitutional r statutory right of appellants, or prejudicial error otherwise, having been made to appear, and the court being duly advised in the premises, it is, therefore,

CONSIDERED, ORDERED AND ADJUDGED that the order of judgment appealed from, as pronounced against each of said appellants, be and the same is hereby affirmed, and the costs incident to this appeal, in the amount of $0.00, are taxed against the said appellants.

DONE AND ORDERED at Tallahassee, Leon County, Florida, this 15th day of November, A.D. 1957.

/s/ W. MAY WALKER
W. May Walker
Circuit Judge

[SEAL]

STATE OF FLORIDA,
COUNTY OF LEON.

I, GEO. G. CRAWFORD, Clerk of the Circuit Court in and for the County aforesaid, do hereby certify that the above and foregoing copy of Judgment on appeal from Municipal Court of the City of Tallahassee, Florida, was filed for record in my office on the 15th day of November, A. D. 1957, at 11:17 o'clock A. M. and was duly recorded the same day and hour in Judgment Lien Docket No. 10 at page 161, of the public records in this office, also in Minute Book No. 35, Page 511.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Court the day and year last above written.

/s/ GEO. G. CRAWFORD, *Clerk*
By Myrtle B. DeMilly, D.C.

APPENDIX C

In the

CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF FLORIDA

In and for Leon County

At Law #8581

Leonard D. Speed, Joseph Spagna and Johnny Herndon,

Appellants,

—vs.—

City of Tallahassee, Florida,

Appellee.

Order Denying Motion for Review of Judgment on Appeal

This cause coming on this day to be finally heard upon the motion of appellants for review of the court's final judgment entered on the 15th day of November, 1957, and counsel for the respective parties now being before the court and having argued the merits of said motion, and it now appearing to the court that the sufficiency of the evidence to sustain the conviction of the said defendants was duly considered as well as each and every other assignment of error or ground for the appeal, and the court now being otherwise duly advised in the premises, it is, therefore,

Considered, ordered and adjudged that said motion for review of the judgment of this court upon said appeal should be and the same is hereby denied.

DONE AND ORDERED at Tallahassee, Leon County, Florida, this 18th day of November, A.D. 1957.

/s/ W. MAY WALKER
W. May Walker
Circuit Judge

APPENDIX D

ORDINANCE No. 741

An ordinance amending Section IV of that certain ordinance entitled "An Ordinance granting to Florida Associates, Inc., a corporation organized and existing under the laws of the State of Florida, the authority, right and privilege to establish, maintain and operate a bus transportation system in the City of Tallahassee, Florida, for the transportation for hire of passengers and fixing the terms and conditions of such grant" passed and adopted by the City Commission on the 13th day of February, A. D. 1940, being Ordinance No. 368, as amended by Ordinance No. 659, passed and adopted by the City Commission on the 10th day of March, A. D. 1953; by providing for the making and enforcement of reasonable rules and regulations governing the seating and placing of passengers transported on motor buses for hire, and providing for penalty for the violation hereof.

WHEREAS, an emergency exists in the City of Tallahassee, in that civil actions at law were recently filed in both the Federal and State Courts of Leon County, Florida, asking for judicial interpretations as to the validity of Section IV, Ordinance 368, requiring the adoption and enforcement of operating rules providing for the segregation of the human races when more than one race is transported on motor buses operated under said ordinance; and

WHEREAS, the said Section IV of Ordinance 368 is of doubtful validity in light of recent decisions of the Supreme Court of the United States construing similar statute and ordinance provisions; and

WHEREAS, certain acts of violence and destruction of property, accompanied by threats to the safety of the

passengers being transported on the motor buses being operated under the provision of said Ordinance, and threats to the peace, tranquility and good order of society in Tallahassee, have occurred as a result of the operation of said motor buses; and

WHEREAS, because of the foregoing conditions the Governor of Florida, by official proclamation dated January 1, 1957, ordered all motor bus transportation in Tallahassee suspended until further order of the Governor, as a result of which citizens of this City are without public transportation; and

WHEREAS, IT IS CONSIDERED TO BE IN THE BEST INTEREST OF THE public, the general welfare of the City of Tallahassee, that public motor bus transportation be resumed at the earliest possible time, and in a manner that will serve the needs of the public and at the same time will insure, as nearly as practicable, that the health, life, limb and person of the passenger using this facility will not be threatened or endangered and that peace, tranquility and good order will be preserved; and

WHEREAS, the conditions recited above have created an emergency which demands prompt action by this commission, therefore an emergency is hereby declared to exist.

BE IT ENACTED BY THE PEOPLE OF THE CITY OF TALLAHASSEE:

SECTION 1. That Section IV of the City Ordinance entitled "An Ordinance granting to Florida Associates Inc., a corporation, organized and existing under the laws of the State of Florida, the authority, right and privilege to establish, maintain, and operate a bus transportation system in the City of Tallahassee, Florida for the transportation for hire of passengers and fixing the terms and conditions of such grant," passed and adopted on the 13th day of February 1940, as amended by Ordinance No. 659, passed

and adopted by the City Commission on the 10th day of March, 1953, be and the same is hereby amended to read as follows:

SECTION IV.

A. The maximum seating capacity of each motor bus operated by the Company shall be not greater than the manufacturer's rated capacity but passengers may be permitted to stand provided each such passenger is assigned a place in the bus in keeping with the provisions of Paragraph B hereof.

B. The Company shall make and enforce reasonable rules and regulations governing the seating and placement in its motor buses of passengers transported by it for hire in such a manner as to insure:

(a) An equal distribution throughout its buses of the weight of the passengers being transported, as nearly as practicable, to the end that traffic hazards likely to result in accidents or collisions may be minimized; (b) The maximum health and safety of the passengers being transported by it to the end that life, limb and person of said passengers will not be endangered or threatened by violence or overt acts of violence; and (c) That peace, tranquility and good order among said passengers being so transported, and of society generally, is preserved.

C. The rules and regulations to be adopted by the Company as required by Paragraph B hereof shall provide for the seating of its passengers for hire; shall provide for the assignment of a numbered seat for each passenger so transported, and shall provide that each passenger so transported shall occupy only the seat so assigned; and shall provide for the placement of its passengers who are permitted to stand.

D. The rules and regulations to be adopted by the Company as required by Paragraph B hereof shall be submitted to and approved by the City Commission before the same become effective and no operation under the provisions of this Ordinance shall be permitted until such rules and regulations are agreed upon between the Company and the City Commission.

E. It shall be unlawful for any person to occupy any space on any motor bus transportation facility for hire operating under the provisions of this Ordinance within the City Limit of the City of Tallahassee, other than the space assigned to said person by the Company or its agent, servants or employees operating the said transportation facility.

F. Any passenger who refuses to accept and occupy the space assigned to him, and who, upon tender of the fare paid, refuses peaceably and without disorder to remove himself from the motor bus after being requested so to do by the driver thereof, shall be guilty of violating the provisions of this Ordinance and shall be punished as provided herein.

G. The word "space" as used in this Section IV shall mean the seat or place assigned to a passenger as provided by Paragraphs A, B and C hereof.

H. The driver of any such motor bus public transportation facility may cause any person violating the provisions of this Ordinance to be delivered to the proper authority for arrest.

I. The violation of any of the foregoing provisions of this Ordinance shall be punished by a fine not exceeding Five Hundred ($500.00) Dollars, or imprisonment for a term not exceeding Sixty (60) days, or by both such fine and imprisonment.

SECTION 2. It is hereby declared to be in the interest of the City Commission that the Sections, Paragraphs, Sentences, Clauses and Phrases of this Ordinance are severable and if any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared unconstitutional by the valid judgment or decree of a Court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Ordinance.

SECTION 3. This Ordinance shall become effective immediately upon publication as required by the Charter Act of said City.

Introduced in the City Commission on the 7th day of January, 1957.

Passed the City Commission on the 7th day of January, 1957.

JOHN Y. HUMPHRESS
Mayor—Commissioner

Attest:

GEORGE C. WHITE
City Auditor and Clerk

January 8——3802

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THE CITY OF TALLAHASSEE, FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA

PETITIONERS' REPLY BRIEF

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LEONARD D. SPEED, JOSEPH SPAGNA, and JOHNNY HERNDON,

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THE CITY OF TALLAHASSEE, FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA

PETITIONERS' REPLY BRIEF

I.

The judgment of the Circuit Court was not reviewable by certiorari in the Florida courts.

Respondent claims that this Court is without jurisdiction under Title 28, United States Code, §1257(3) to review the judgment of the Circuit Court of the Second Judicial Circuit of Florida since, says respondent, its judgment could have been reviewed by the District Court of Appeal and by the Supreme Court of Florida and is, therefore, not a final judgment.

Respondent concedes that no further appeal was possible under Florida law in this case since by both the Constitution

of Florida, Article V, §6 (1956)[1] and the laws of Florida, Florida Statutes Annotated, §26.53, the Circuit Court has final appellate jurisdiction. Cf. *Curry U-Drive It* v. *Ross*, 89 So. 2d 796 (1956); Cf. *American National Bank of Jacksonville* v. *Marks*, 45 So. 2d 336 (1950); *Malone* v. *City of Quincy*, 66 Fla. 52 (1913). However, respondent contends that petitioners could have secured a review of their claimed denial of rights secured by the Federal Constitution via common law writ of certiorari[2] issuing from the District Court of Appeal and the Supreme Court of Florida.

In Florida, it has always been the rule that review upon common law writ of certiorari to a lower court of record is limited to two questions only: (1) whether the inferior court exceeded its jurisdiction and (2) whether the inferior court followed the proper procedure.

Certiorari is not available in Florida to review an erroneous decision.

The Supreme Court of Florida, in 1950, in *American National Bank of Jacksonville* v. *Marks*, *supra*, reiterated, for the express benefit of the Florida bar, this limited scope of review which is available by common law certiorari. The Supreme Court of Florida has adhered to these limitations. *Wilson* v. *McCoy Mfg. Co.*, 69 So. 2d 659 (1954); *Neivert* v. *Evans*, 82 So. 2d 599, 600 (1955); *Tropical Park* v. *Ratcliff*, 97 So. 2d 169, 174 (1957).

Petitioners challenge neither the jurisdiction of the trial or appellate court in this case nor the procedure adopted by either.

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[1] Circuit courts had final appellate jurisdiction in such cases under the old constitution. Florida Constitution (1885) Article V, §11.

[2] There is no statutory certiorari applicable to appeals from municipal courts to circuit courts as in the case of appeals from civil courts of record to the circuit courts as provided by Florida Statutes Annotated §33.12.

In the cases cited by respondent, in which review of the validity of city ordinances was obtained in the Supreme Court of Florida upon common law certiorari, the Court specifically referred to the limited scope of review on common law certiorari in Florida which was reiterated by that Court in the *American National Bank* case, *supra*, and it is also clear that in each of these cases the court considered the petitioners' challenge to the jurisdiction of the municipal court involved. *Malone* v. *City of Quincy*, 66 Fla. 52, 62 So. 922 (1913); *Hunt* v. *City of Jacksonville*, 34 Fla. 504, 16 So. 398 (1894); *Mernaugh* v. *City of Orlando*, 41 Fla. 433, 27 So. 34 (1899).

In the *Hunt* case, which was the first one decided, the court in its opinion specifically referred to the limited scope of the review available upon certiorari (at 508) and specifically pointed out that petitioner, who had been convicted of violating a city ordinance, sought certiorari upon a challenge to the jurisdiction of the municipal court to try him for the offense (at 505). His claim was that the offense charged had been made an indictable offense by state law entitling him to a jury trial which the municipal court could not give because limited to trials without juries. In this case, however, the Court found no lack of jurisdiction or irregularity of procedure.

In the *Mernaugh* case, which followed, the Court again pointed out the limited scope of review (at 442) and again specifically pointed out that petitioner sought certiorari upon a challenge to the jurisdiction of the municipal court on the ground that since the City was without power under state law to enact an ordinance prohibiting the sale of liquor which he had been convicted of violating, its court was without jurisdiction to enforce same (at 436). The Court agreed with petitioner and held that the City was without authority to pass the ordinance and, therefore, its court was without jurisdiction to enforce it.

In the *Malone* case, a similar challenge was made to the power of the City of Quincy to enact the ordinance which petitioner had been convicted of violating and the Court similarly held that the City being without power to pass the ordinance, its court was without jurisdiction to enforce same. Although there is no specific reference by the Court in its opinion in the *Malone* case to a challenge to the jurisdiction of the municipal court by petitioner, it should be noted that in its opinion the Court cites and relies on the *Hunt* case when it again specifically refers to the limited scope of review upon common law certiorari (at 56). It is thus clear that in the *Malone* case the Florida Supreme Court was also proceeding upon the theory that petitioner was challenging the jurisdiction of the municipal court to try him for the offense.

Here petitioners neither challenge the power of the City of Tallahassee to enact an ordinance which purports to regulate the seating of passengers on local buses nor the power of its court to enforce a regulatory ordinance on this subject. The cases cited by respondent are, therefore, not apposite here.

II.

The judgments of the Municipal Court and Circuit Court rest on a denial of petitioners' claim of violation of rights secured by the due process and equal protection clauses of the Fourteenth Amendment.

As the transcript of the proceedings in the trial court discloses, at the close of the respondent's case, petitioners moved for a directed verdict on the ground that the ordinance violates rights secured by the State Constitution and by the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution (T. 62).

The argument of petitioners' counsel and the cases cited by him show conclusively, however, that his reliance was upon rights secured by the Federal Constitution and not by the State Constitution (T. 62-69). Consequently, when the Municipal Court, in denying the motion, ruled that the ordinance was clothed with a presumption of constitutionality and that nothing had been presented by way of testimony to overcome this presumption, it is clear that the court was invoking this familiar rule with respect to the particular constitutional attack made upon the ordinance, which, as the record shows, was limited solely to an attack on federal constitutional grounds. And where, as here, the record clearly spells out that the sole attack upon the ordinance was on federal grounds, all doubt is precluded. *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957).

When petitioners appealed to the Circuit Court, they assigned as grounds for appeal, among others, the trial court's refusal to grant their motion for directed verdict. The Circuit Court had before it the transcript of the proceedings in the trial court which showed that petitioners' only attack upon the ordinance was on federal constitutional grounds. An examination of the briefs submitted by both petitioners and respondent in the Circuit Court shows that neither argument was based on state constitutional grounds, but wholly on federal constitutional grounds. Consequently, there can be no doubt that when the Circuit Court ruled, in its judgment affirming the trial court, that no denial of constitutional rights had been made to appear, it was referring to the Federal and not the State Constitution. The same is true of that court's order denying petitioners' motion for review of judgment on appeal when it denied same on the ground that it had duly

considered each ground for appeal when the case was before it on appeal.

Respectfully submitted,

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Certificate of Service

This is to certify that on the 12 day of March 1958 I served a copy of Petitioners' Supplemental Brief in the above-entitled case upon Leo Foster, counsel for respondent, by mailing a copy of same to him at P. O. Box 669, Tallahassee, Florida, via United States Air Mail.

CONSTANCE BAKER MOTLEY
Attorney for Petitioners

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No. 783

In the Supreme Court of the United States

OCTOBER TERM, 1957

LEONARD D. SPEED, JOSEPH SPAGNA, and JOHNNY HERNDON,
PETITIONERS,

VS.

THE CITY OF TALLAHASSEE, FLORIDA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA

BRIEF FOR THE RESPONDENT THE CITY OF TALLAHASSEE, FLORIDA IN OPPOSITION

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Tallahassee, Florida
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March 5, 1958.

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OPINIONS BELOW

The opinion of the Municipal Judge of the City of Tallahassee, Florida was merely a ruling on a motion for a directed verdict at the conclusion of the City's case and is not a final judgment or order. The motion for directed verdict is found at page 62 of the certified transcript of the proceedings in the Municipal Court and the ruling thereon is found on page 74 thereof.

Subsequently, the Municipal Court entered final judgments and sentences in the three cases which are printed in Appendix A, infra.

JURISDICTION

The Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, which affirmed the judgments[1] in these three cases, is the primary trial court in Florida and has final appellate jurisdiction of all cases arising in Municipal Courts and no appellate proceedings lie in such cases from the Circuit Courts,[2] but the Supreme Court and the District Courts of Appeal have express power to issue writs of certiorari which is a common law writ which issues in the sound judicial discretion of the Court to an inferior court, not to take the place of an appeal, but to cause the entire record of the inferior court to be brought up by certified copy for inspection in order that the superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction; or has not proceeded according to the essential requirements of the law in cases where no direct appellate proceedings are provided by law. *Malone vs. The City of Quincy*, 66 Fla. 52, 62 So. 922.

The judgment of the Circuit Court under the Florida Constitution is not final and is reviewable by the District Courts of Appeal and by the Court of last resort, the Supreme Court of Florida, where it can be shown, as is alleged here, that the Circuit Court has not proceeded according to the essential requirements of the law. The validity of City ordinances are often tested in Florida in this manner. *Hunt v. The City of Jacksonville*, 34 Fla. 504, 16 So. 398; *Mernaugh v. City of Orlando*, 41 Fla. 433, 27 So. 34; *Malone v. City of Quincy*, 66 Fla. 52, 62 So. 922.

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[1] The three judgments and sentences in the cases No. 60022 (City of Tallahassee vs. Joseph Spagna); No. 60023 (City of Tallahassee vs. Johnny Herndon); and No. 60024 (City of Tallahassee vs. Leonard D. Speed) are set out in the Appendix A, infra.

[2] Article 5, Sections 1, 3, 4, 5, and 6, Constitution of the State of Florida, are set out in Appendix B, infra. Article 5 is the judiciary article of the Florida Constitution.

If there is discretionary review by a higher State Court, the exercise of such discretion must be invoked. *Stratton vs. Stratton,* 239 U. S. 55; *Matthews v. Huwe,* 269 U. S. 262, 265-6.

The jurisdictional statute permitting this Court to review State Court cases by certiorari relates only to the final judgments rendered "by the highest court of a State in which a decision could be had." 28 U. S. C. Section 1257. A decision could have been had in these three cases in the District Court of Appeal and in the Florida Supreme Court by the writ of certiorari.

It is essential to the jurisdiction of this Court under Section 1257, supra, that a substantial Federal question has been properly raised in the State Court proceedings. The Federal right, privilege, or immunity must have been specially set up or claimed and the proper method of raising the Federal question is dependent upon Florida practice. *Central Union Co. v. Edwardsville,* 269 U. S. 190, 194-5; *Pennsylvania R. Co. v. Illinois Brick Co.,* 297 U. S. 447, 462-3; *Parker v. Illinois,* 333 U. S. 571, 574-5.

On the 19th of January, 1957, one Emory Elkins filed his affidavit that Joseph Spagna, John Herndon, and Leonard Speed did unlawfully occupy a space on a motor transportation bus operated for hire by Cities Transit, Inc., other than the space assigned by the driver or operator of said transportation bus and did then and there refuse to accept and occupy the space assigned them, and upon tender of the fare paid, refused peaceably and without disorder to remove themselves from the motor transportation bus after being requested so to do by the driver or operator thereof contrary to the ordinance of the City of Tallahassee, Florida, in such cases made and provided and on the same date warrants for their arrest were issued by the Municipal Judge. The Defendants did not file a motion to quash the affidavit as they should have

done according to Florida practice but in lieu thereof entered pleas of not guilty and the case went to trial on the issue of whether or not the Defendants had violated the ordinance. They were found guilty and judgment and sentence of the Municipal Court were entered.

The Defendants filed their grounds for appeal as follows: (1) the verdict is contrary to the weight of the evidence; (2) the verdict is contrary to the law; (3) the court erred in denying defendants motion for directed verdict. The material part of the motion for a directed verdict of acquittal is as follows: "The ordinance, as promulgated and as enforced by the City of Tallahassee, is in violation of the Constitution of the State of Florida, the Constitution of the United States; more specifically, the 14th Amendment, the Due Process Clause and the Equal Protections Clause of said Constitution of the United States, in that the salient parts of this ordinance ostensibly require seating passengers in order to distribute weight, avoid health hazards, preserve peace, tranquility and good order, and numerous other illusory and certainly almost mythical factors." (T-63, 64)

The Circuit Court affirmed the judgments and sentences of the Municipal Court.

The jurisdiction of this Court to re-examine the final judgment of the State Court cannot arise from mere inference but only from averments so distinct and positive as to place it beyond question that the petitioner intended to assert a Federal Right. *Oxley Stave Co. vs. Butler County,* 166 U. S. 548, 655. The Supreme Court will not take cognizance of a claim grounded upon a mere reference to the Constitution of the United States. *Herndon v. Georgia,* 295 U. S. 441, 442-3; *Harding vs. Illinois,* 196 U. S. 78, 88; *Capital City Dairy Co. vs. Ohio,* 183 U. S. 238, 248.

We recognize that where the State Court holds that a Federal question is before it and then proceeds to consider and dispose of same, the Supreme Court's concern with proper raising of the Federal question disappears but "it is well settled in this Court that it must be made to appear that some provision of the Federal, as distinguished from the State Constitution, was relied upon and that such provision must be set forth." *New York Central vs. New York,* 186 U. S. 269, 273. Here the only claim made was "the ordinance, as promulgated and as enforced by the City of Tallahassee is in violation of the Constitution of the State of Florida, the Constitution of the United States * * *." The Court overruled the motion opining "An ordinance * * * comes into Court with a presumption of legality and constitutionality * * *." (T-74)

The judgment on appeal provided "This cause coming on to be * * * heard upon the appeal * * * and the record in said cause having been examined and no denial of any constitutional * * * right of appellants * * * having been made to appear * * * ORDERED * * * that the * * * judgment appealed from * * * is * * * affirmed * * *."

The motion for review sets up three grounds:

> "1. That the judgment of this Court which reads in part: 'no denial of any constitutional or statutory right of appellants or pre-judicial error otherwise, having been made to appear, and the court being advised in the premises . . . .,' does not take into consideration Ground Number 1 of the appellants' assignment of errors which urges that the appellees did not prove the commission of any crime cognizable by law beyond and to the exclusion of a reasonable doubt, said assignment dealing with the sufficiency of evidence and not with any statutory, constitutional or prejudicial error.

"2. That this Court erred in ruling that there has been no denial of any constitutional or statutory right.

"3. That this Court erred in ruling that there has been no prejudicial error made to appear in this case."

The order denying motion for review states: "This cause coming on * * * to be * * * heard upon the motion of appellants for review of the Court's final judgment * * * and it now appearing to the Court that the sufficiency of the evidence to sustain the conviction of the said defendants was duly considered as well as each and every other assignment of error or ground for the appeal * * * ORDERED * * * that said motion * * * is * * * denied * * *."

If the claim is made that an ordinance is unconstitutional it will be assumed that reference is being made to the State Constitution and rights thereunder rather than the Federal Constitution. *New York ex rel Bryant vs. Zimmerman*, 278 U. S. 63, 67-8; *Bowe v. Scott*, 233 U. S. 658, 664-5. These judgments and opinions neither explicitly or impliedly recognize the presence of a Federal question nor do they render a decision thereon. The judgment of the Circuit Court here sought to be reviewed is based on non-Federal grounds: (1) sufficiency of the evidence; (2) no denial of any Florida Constitutional right. The non-Federal grounds are adequate to support the judgment, and review by this Court is precluded. *Fox Film Corp. v. Muller*, 296 U. S. 207; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.* 243 U. S. 157, 163-4.

QUESTION PRESENTED

IS THE ORDINANCE AS PROMULGATED AND AS ENFORCED BY THE CITY OF TALLAHASSEE, IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, 14TH AMENDMENT, THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE IN THAT SALIENT PARTS OF THIS ORDINANCE OSTENSIBLY REQUIRE SEATING PASSENGERS IN ORDER TO DISTRIBUTE WEIGHT, AVOID HEALTH HAZARDS, PRESERVE PEACE, TRANQUILITY AND GOOD ORDER?

This was the question presented to the trial court. (T. 63-64)

STATUTE INVOLVED

Ordinance No. 368, as amended by Ordinance No. 659, as amended by Ordinance No. 741, of the City of Tallahassee, Florida.

STATEMENT OF THE CASE

On the 19th of January, 1957, one Emory Elkins filed his affidavit averring that the Defendants Spagna, Herndon and Speed, performed certain acts and deeds contrary to the ordinance of the City of Tallahassee. The Defendants entered pleas of not guilty and the cases proceeded to trial on that issue. The Defendants made no motion to quash nor did they in any way attack the affidavit charging the offense as is customary and usual in the Florida practice. The Defendants were found guilty and the judgment and sentence of the Municipal Court were entered.

The Defendants filed their notice of and grounds for appeal. At the trial held before the City Judge, William F. Jacobs was called as a witness on the behalf of the City of Tallahassee and testified that he had prepared City of Tallahassee Exhibit No. A, which is the chart

showing the seating arrangements on the City Transit bus and the chart was admitted into evidence without objection. This chart is very material evidence in this case.

Emory Elkins was then called by the City and testified that he was a driver for the bus company and was so employed during January, 1957. He examined the chart (City's Exhibit No. A) and testified that the chart accurately portrayed the position of seats on the bus in question and that he was driving the bus on January 19th, 1957, and that Joseph Spagna, John Folsom and a person whose name was Kennedy, came on his bus as a party of three; they gave him transfers as they entered the bus and he assigned them seats, which he was required to do as a part of his job. The seats that he assigned the three were 15, 16, and 17, which seated them —two together and one across the aisle. He further testified that they then sat in the seats so assigned.

He further testified that the Defendant Dan Speed and the Defendants John Herndon and Harold Owens also approached his bus as a party of three and handed him transfers; that they entered the bus and he assigned them seats numbered 19, 21, and 22, which sat two of them together and one across the aisle. He further testified that they also sat in their assigned seats; that other people were passengers on the bus and after the passengers were seated he proceeded to continue on his regularly assigned run; that his first stop was Gadsden and Georgia Streets where a passenger was let off, at which time the Defendants Spagna, Speed, and Herndon switched seats; that is, the Defendant Speed, who had been assigned seat no. 19, moved to seat no. 16; Folsom moved from his seat to another, and the Defendant Spagna moved from the seat assigned to him to another seat. Neither of the three Defendants had asked for a re-assignment of their seats and this switching of seats

was done without any authority. He testified that he asked them to take their assigned seats or accept a refund of their money and they refused the fare and refused to get off and refused to resume their assigned seating arrangements; that he then telephoned the police; that the police responded to his call and when they arrived the Defendants were still sitting in the seats which they had arbitrarily appropriated and were not occupying the space assigned to them by the driver.

On cross examination Elkins stated that he started the assignment of seats on his bus to all passengers at all times; that he was instructed to assign seats according to the weight of the persons boarding the bus, to take into consideration the possibility of a collision in distributing this weight; that he was also instructed to assign seats taking into consideration health hazards; that he was not instructed to refrain from assigning seats to colored and white passengers together; that he was instructed to assign passengers to seats in such manner as to preserve the peace, tranquility and good will of the community and that in studying the system of assignments he made a study of Ordinance No. 741 and all the factors involved therein. He further testified that once assigned a seat, an individual would have no right to change that seat.

Robert Maige, Captain Tallahassee Police Department, testified that when he got to the bus, Herndon and Kennedy were sitting in seats 15 and 17; Speed was sitting in 16; Folsom in 18; Spagna in 20 and Harold Owens in 22; that the driver asked them to get back in the seats they had been assigned and they refused; that the driver offered them their pay back to get off the bus and they would not do that; that Captain Todd asked them to resume their seats and they would not move, and that they were then placed under arrest. Captain Wayne Todd corroborated Maige's testimony.

The City Attorney then introduced into evidence a certified copy of paragraph 7 of the original petition for declaratory judgment and injunctive relief filed in Civil Action No. 603 in the United States District Court for the Northern District of Florida, Tallahassee Division, as City Exhibit No. B, which constitutes a sworn judicial admission as to the facts contained therein. This Exhibit is also material to the issues before the Court. The City then rested its case and the Defendants moved for a directed verdict. The Court overruled the motion for a directed verdict. The Defendants then announced that they did not wish to present any testimony and rested. The Court then found the Defendants Spagna, Speed, and Herndon guilty.

ARGUMENT

I

HOW FEDERAL QUESTIONS WERE RAISED.

These cases were initiated by the Affidavit of one Emory Elkins. The Defendants did not file a motion to quash the Affidavit nor did they attack it in any manner but, on the contrary, at their arraignment, entered pleas of not guilty. At the beginning of the trial the Court reiterated these facts and asked the Attorney for the Defendants if a plea of not guilty was still his plea at the morning of the trial. The Defense counsel answered "That is the plea." (T-2)

The case proceeded on the issue made by the plea of not guilty and the trial court and the appellate court found that the evidence was sufficient to uphold a judgment of guilty and a sentence for the violation of the ordinance.

II

THE DECISION BELOW IS CLEARLY CORRECT

The trial court did not err in refusing to grant the Defendants a verdict of acquittal on the second ground interposed: "The ordinance, as promulgated and as enforced by the City of Tallahassee, is in violation of the Constitution of the State of Florida, the Constitution of the United States; * * * in that the salient parts of this ordinance ostensibly require seating passengers in order to distribute weight, avoid health hazards, preserve peace, tranquility and good order, and numerous other illusory and certainly almost mythical factors."

The ordinance, on its face, does not have the effect of depriving the Defendants of their liberty or their property without due process of law, and on its face, is a reasonable exercise of police power in the seating arrangement requirement provided therein.

In fact the Defendants Herndon and Speed in their sworn petition filed in the United States District Court for the Northern District of Florida, Civil Action No. 603, have stated under oath:

> "That while this ordinance purports to make a valid classification, its operation and application for all practical purposes are discriminary on account of race and in violation of Title 18 U. S. Code Section 242." (City of Tallahassee Exhibit B (T 57-60)).

The Defendants, therefore, admit that the ordinance makes a valid classification but complain that its operation and application make it discriminatory. Thus, the statute is constitutional because, on its face, it establishes a reasonable classification and does not have the effect of depriving Defendants of their liberty or property without due process of law, nor does it have as its only basis for assignment the prohibited standard of race.

See *Yick Wo vs. Hopkins*, 118 U. S. 356, and *Davis vs. Schmell*, 81 Fed. Supp. 872, affirmed 336 U. S. 933. Nor is there any testimony to show that the operation of the statute or the enforcement of the statute by the City of Tallahassee is in violation of the Constitution of the United States, nor does the operation or enforcement have the effect of depriving defendants of their liberty or property without due process of law or as having implied as its only basis for assignment the prohibited standard of race.

The testimony of the driver is uncontradicted that he was instructed to assign seats according to weight of the persons boarding the bus; to take into consideration the possibility of collision in distributing this weight; to assign seats, taking into consideration health hazards; to assign passengers to seats in such manner as to preserve peace, tranquility and good will of the community. He testified that he was not instructed to refrain from assigning seats to colored and white persons together. He was asked this direct question:

"Q. Were you instructed to refrain from assigning seats to colored and white passengers together?

* * * * *

"A. No." (T 22-24)

* * * * *

"Q. * * * were you instructed to assign passengers boarding the bus to seats in such a manner as to preserve the peace, tranquility and good will of the community?

"A. Yes.

* * * * *

"Q. * * * did you make a study of Ordinance No. 741, and all the factors involved therein?

"A. Yes.

"Q. And since January 7, 1957, you have been seating all passengers on the bus that you are operating according to these standards set by Ordinance No. 741? Is that correct?

"A. Yes." (T 24-25)

The Defendants offered no evidence to the contrary and there is no evidence in this record that the basis of assignment was ever the prohibited standard of race. In fact, there is no evidence in the record as to the race, creed or color of the Defendants or any of the persons involved in this controversy. As far as the record goes these Defendants could be all negroes, or they could all be white.

When counsel, in their brief, state:

> "Tallahassee cannot accomplish indirectly by this ordinance that which it is prohibited from doing directly by the dictates of the requirement of equal protection; for even if the ordinance in question can be said to be fair on its face, the record discloses that here it was in fact used to separate Negro and white passengers solely because of their race, no other reason for the separation appearing."

they bring a matter into Court which is not in the record and is no fair inference from the factual situation as presented by the record. The statement "the record discloses that here it was in fact used to separate Negro and white passengers solely because of their race" is untrue. The record shows that the undisputed sworn testimony of the driver of the bus is to the contrary.

The Supreme Court of the United States in the case of the *United Automobile Aircraft and Agricultural Implement Workers of America vs. Wisconsin Employment Relations Board*, 350 U. S. 521, stated:

> "This general rule does not take from the States power to prevent mass picketing, violence, and overt

threats of violence. The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. * * *

"The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect."

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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Tallahassee, Florida
Counsel for Respondent.

March 5, 1958.

APPENDIX A

CASE NO. 60022

IN THE MUNICIPAL COURT OF THE CITY OF TALLAHASSEE, FLORIDA

CITY OF TALLAHASSEE, VS. JOSEPH SPAGNA	CHARGE Violation of Seating Arrangement Ordinance, Park and Monroe, Within the City Limits of the City of Tallahassee, Florida, on the 19 day of January, 1957, contrary to the Laws and Ordinances of said City. Defendant arranged and plead not guilty.

JUDGMENT

After hearing the evidence and duly considering the same, the Court found the Defendant guilty of the charge and pronounced the following sentence, to-wit: the sentence of the law and the judgment of the Court is that you pay a fine of *$500* dollars and in default of said fine, that you be confined to the City Jail for a period of *60* days until this judgment is satisfied, & *60* days.
Date Sentenced 2-27-57

/s/ JOHN A. RUDD
Municipal Judge

CASE NO. 60023

IN THE MUNICIPAL COURT OF THE
CITY OF TALLAHASSEE, FLORIDA

	CHARGE
CITY OF TALLAHASSEE, vs. JOHNNY HERNDON	Violation of Seating Arrangement Ordinance, Park and Monroe, Within the City Limits of the City of Tallahassee, Florida, on the 19 day of January, 1957, contrary to the Laws and Ordinances of said City. Defendant arranged and plead not guilty.

JUDGMENT

After hearing the evidence and duly considering the same, the Court found the Defendant guilty of the charge and pronounced the following sentence, to-wit: the sentence of the law and the judgment of the Court is that you pay a fine of *$500* dollars and in default of said fine, that you be confined to the City Jail for a period of *60* days until this judgment is satisfied, & *60* days.
Date Sentenced 2-27-57

/s/ JOHN A. RUDD
Municipal Judge

CASE NO. 60024

IN THE MUNICIPAL COURT OF THE
CITY OF TALLAHASSEE, FLORIDA

	CHARGE
CITY OF TALLAHASSEE, VS. LEONARD D. SPEED	Violation of Seating Arrangement Ordinance, Park and Monroe, Within the City Limits of the City of Tallahassee, Florida, on the 19 day of January, 1957, contrary to the Laws and Ordinances of said City. Defendant arranged and plead not guilty.

JUDGMENT

After hearing the evidence and duly considering the same, the Court found the Defendant guilty of the charge and pronounced the following sentence, to-wit: the sentence of the law and the judgment of the Court is that you pay a fine of *$500* dollars and in default of said fine, that you be confined to the City Jail for a period of *60* days until this judgment is satisfied, & *60* days.
Date Sentenced 2-27-57

/s/ JOHN A. RUDD
Municipal Judge

APPENDIX B

ARTICLE V. JUDICIAL DEPARTMENT

§ 1. Courts

Section 1. The judicial power of the State of Florida is vested in a supreme court, district courts of appeal, circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, juvenile courts, courts of justices of the peace, and such other courts, including municipal courts, or commissions, as the legislature may from time to time ordain and establish. [Adopted general election, Nov. 6, 1956.]

§ 3. Practice and Procedure

Section 3. The practice and procedure in all courts shall be governed by rules adopted by the supreme court. [Adopted general election Nov. 6, 1956.]

§ 4. Supreme Court

Section 4. (a) *Organization.* The supreme court shall consist of seven members, one of whom shall be the chief justice. Five justices shall constitute a quorum, but the concurrence of four shall be necessary to a decision.

(b) *Jurisdiction.* Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon

chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

The supreme court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right.

The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.

The supreme court or any justice thereof may issue writs of habeas corpus returnable before the supreme court or any justice thereof, or before a district court of appeal or any judge thereof, or before any circuit judge.

The supreme court shall provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked.

(c) *Chief Justice.* The chief justice of the supreme court shall be chosen by the members of the court and shall serve for a term of two years. In the event of a vacancy, a successor shall be chosen within sixty days for a like term. During a vacancy or whenever the chief justice is unable to act for any reason, the justice longest in continuous service and able to act shall act as chief justice.

(d) *Clerk and Marshal; Process.* The supreme court shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by law. The marshal shall have the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose. [Adopted general election Nov. 6, 1956.]

§ 5. District Courts of Appeal

Section 5. (a) *Appellate Districts.* The state shall be divided into three appellate districts of contiguous counties as the legislature may prescribe.

(b) *Organization; number and selection of judges.* A district court of appeal shall be organized in each appellate district. There shall be three judges of each district court of appeal. Not less than three judges shall consider each case and the concurrence of a majority shall be necessary to a decision. The court shall hold at least one session every year in each judicial circuit within the district wherein there is ready business to transact.

The judges of the district courts of appeal organized hereunder shall be selected as follows: Between June first and July first, 1957, the governor shall appoint three persons to serve as judges of each district court of appeal until their successors are elected, as herein provided. The judges so appointed shall take office and assume their duties on July first, 1957, and shall serve for a term to be designated by the governor in accordance with the following schedule: The governor shall appoint one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1959, following the election of his successor at the general election in November 1958, which judges shall be identified as Group "A"; one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1961, following the election of his successor at the general election in November 1960, which judges shall be identified as Group "B"; and one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1963, following the election of his successor at the general election in November 1962, which judges shall be identified as Group "C".

The successors of the original judges of the district courts of appeal shall be elected at the general election next preceding the expiration of their respective terms of office.

(c) *Jurisdiction.* Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court.

The supreme court shall provide for expeditious and inexpensive procedure in appeals to the district courts

of appeal, and may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal.

The district courts of appeal shall have such powers of direct review of administrative action as may be provided by law.

A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before that district court of appeal or any judge thereof, or before any circuit judge in that district. A district court of appeal may issue writs of mandamus, certiorari, prohibition, and quo warranto, and also all writs necessary or proper to the complete exercise of its jurisdiction.

(d) *Clerks and Marshals.* Each district court of appeal shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court may direct. Their compensation shall be fixed by law. The marshal shall have power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose. [Adopted general election Nov. 6, 1956.]

§ 6. Circuit Courts

Section 6. (a) *Judicial Circuits.* The legislature may establish not more than sixteen judicial circuits each composed of a county or contiguous counties and of not less than fifty thousand inhabitants according to the last census authorized by law, except that the county of Monroe shall constitute one of the circuits.

(b) *Circuit Judges.* The legislature shall provide for one circuit judge in each circuit for each fifty thousand inhabitants or major fraction thereof according to the

last census authorized by law. In circuits having more than one judge the legislature may designate the place of residence of any such additional judge or judges.

(c) *Jurisdiction.* The circuit courts shall have exclusive original jurisdiction in all cases in equity except such equity jurisdiction as may be conferred on juvenile courts, in all cases at law not cognizable by subordinate courts, in all cases involving the legality of any tax, assessment, or toll, in the action of ejectment, in all actions involving the titles or boundaries of real estate, and in all criminal cases not cognizable by subordinate courts. They shall have original jurisdiction of actions of forcible entry and unlawful detainer, and of such other matters as the legislature may provide. They shall have final appellate jurisdiction in all civil and criminal cases arising in the county court, or before county judges' courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace. The circuit courts and judges shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction.

The circuit courts and circuit judges shall have such extra-territorial jurisdiction in chancery cases as may be prescribed by law.

(d) *Court Commissioners.* A circuit judge may appoint in each county in his circuit one or more attorneys at law, to be court commissioners, who shall have power in the absence from the county of the circuit judge, to allow writs of injunction and to issue writs of habeas corpus, returnable before himself or the circuit judge. Their orders in such matters may be reviewed by the circuit judge, and confirmed, qualified or vacated. They may be removed by the circuit judge. The legislature

may confer upon them further powers, not judicial, and shall fix their compensation.

(e) *Recommendation to Attorney General; Report to Legislature.* It shall be the duty of the judges of the circuit courts to report to the attorney general at least thirty days before each session of the legislature such defects in the laws as may have been brought to their attention, and to suggest such amendments or additional legislation as may be deemed necessary. The attorney general shall report to the legislature at each session such legislation as he may deem advisable.

(f) *State Attorneys.* In each judicial circuit a state attorney shall be elected by the qualified electors of that circuit in the same manner as other state and county officials, to serve a term of four years and to fulfill duties prescribed by law.

(g) *Clerks of the Circuit Courts.* In each county a clerk of the circuit court, who shall also be clerk of the board of county commissioners, recorder, and ex officio auditor of the county, shall be elected by the qualified electors of that county in the same manner as other state and county officials, to serve a term of four years and to fulfill duties prescribed by law. [Adopted general election Nov. 6, 1956.]

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for the Respondent The City of Tallahassee, Florida, In Opposition, has been furnished by Air Mail, postage prepaid, to the following counsel in compliance with Rule 33, Section 3, Subsection b, Supreme Court Rules.

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